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No. 88-1677

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONNIE O. KITCHENS, et al.,

Petitioners,

v.

STATE OF OREGON ex rel. ADULT AND FAMILY SERVICES DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the state court's judgment rest on an independent and adequate state procedural ground?

2. Is the state court's judgment final within the meaning of 28 U.S.C. section 1257(3) (1982)?

3. Does the Due Process Clause require a state to notify a putative father when the mother applies for public assistance?

4. Does the Equal Protection Clause preclude a state from distinguishing those parents whose legal obligation to provide child support has been established from those parents whose obligation has not been established?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent State of Oregon accepts, as adequate for review, petitioners' statement of the opinions below and their statement of the constitutional and statutory provisions involved.

JURISDICTION

Although petitioners filed a timely petition for certiorari, this Court lacks jurisdiction for two reasons. First, the state court's judgment rests on an adequate and independent state procedural ground. Second, the state court's judgment is not final within the meaning of 28 U.S.C. section 1257(3) (1982). Both of these issues are discussed below as reasons for denying the petition for certiorari.

STATEMENT OF THE CASE

This brief will first discuss the procedural posture in which this litigation arises. It then will discuss the applicable facts.

I. The Procedural Posture of this Case.

This litigation arises out of three suits that were consolidated in state court. The state initiated separate proceedings against Ronnie Kitchens, John Moore, and Robert Dickinson (the "putative fathers" or "petitioners") to establish that each was the father of an illegitimate child and responsible for that child's support. Each petitioner answered denying that he was the father. Each petitioner also raised affirmative defenses in which he alleged that the state failed to notify him that it was providing support to the child and that the mother had named him as the father of the child when she applied for public assistance. Each petitioner claimed that this failure violated the Oregon Constitution, the Due Process Clause, and the Equal Protection Clause. Finally, each petitioner alleged that, as a matter of state law, the state was estopped or barred by laches from establishing his paternity at this point.

The putative fathers moved for summary judgment on their state and federal constitutional affirmative defenses. The state opposed the motions on two grounds. Based on affidavits it filed, the state argued that summary judgment should be denied because there were disputed issues of material fact. It also argued that it should prevail as a matter of law. The trial court found that there were no disputed issues of material fact, and that the putative fathers were correct as a matter of state and federal constitutional law.

The Oregon Court of Appeals reversed. *State ex rel. AFSD v. Kitchens*, 93 Or. App. 685, 690, 763 P.2d 1196 (1988). It held, as a matter of state procedural law, that there were disputed issues of material fact that made summary judgment improper. It reasoned that there was no need to reach the putative fathers' constitutional defenses until the trial court resolved whether they were the biological fathers—a factual question that remained in dispute. *Id.*, 93 Or. App. at 690-91. If on remand the trial court found they were, then it would need to decide those defenses. *Id.* at 691.

The court of appeals' decision does not reach the putative fathers' state or federal constitutional claims. Nor does its opinion bar the trial court from considering those claims on remand. Its opinion merely establishes the sequence in which the trial court should consider the non-constitutional and constitutional issues presented in this litigation. The Oregon Supreme Court denied review,[1] 307 Or. 340, 760 P.2d 400 (1989) and the putative fathers have petitioned for certiorari.

II. Facts.

Because this litigation arises on the putative fathers' motions for summary judgment, the following facts are set out

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[1] Oregon Supreme Court review, like the Court's review by writ of certiorari, is discretionary.

in the light most favorable to the state. *See Seeborg v. General Motors Corporation*, 284 Or. 695, 699, 588 P.2d 1110 (1978) (under Oregon procedure, "[t]he record on summary judgment is viewed in the light most favorable to the party opposing the motion"). Although the facts in each of the three consolidated cases are parallel, it is appropriate to discuss briefly the facts concerning each putative father.

A. Ronnie Kitchens.

Ronnie Kitchens was having sexual relations with Rhonda Marsh. (Resp. to Summary Judgment, Ex. 2, Depo. of Ronnie Kitchens at 11-12). In December 1981, Ms. Marsh told Mr. Kitchens that she was pregnant with his child. (Resp. to Summary Judgment, Ex. 3, Aff. of Rhonda Marsh Kastel). Ms. Marsh asked Mr. Kitchens to marry her, but he refused and told her to have an abortion. (*Id.*). She refused to do so. (*Id.*). In April 1982, Mr. Kitchens ended his relationship with Ms. Marsh. (*Id.*). He told her to go on welfare if she needed money. (*Id.*).

Two weeks after the baby's birth in September 1982, Mr. Kitchens visited Ms. Marsh and the infant. (*Id.*). He has never shown any other interest in the child, nor has he paid any support for the child. (*Id.*). Ms. Marsh testified in her affidavit:

> I have stayed in the same place thinking he might change his mind and come back. He has always known where to find us. Even when the baby was sick and his family told him the baby nearly died, he never came to see us. He also has bragged to me that about how no one will ever make him pay [child support].

(*Id.*)

After Mr. Kitchens refused to visit the child or pay support, Ms. Marsh applied to the Oregon Adult and Family Services Division for Aid to Families with Dependent Children ("AFDC"). As part of her application, she named Mr.

Kitchens as the father of her child. Ms. Marsh also assigned her right to child support to the state. The state welfare agency did not notify Mr. Kitchens that Ms. Marsh named him as the father. The state initiated proceedings in 1986 to have Mr. Kitchens declared to be the father of the child and to recover past and future child support from him pursuant to the assignment.

B. John Moore.

Mr. Moore had a "casual" relationship with Barbara Simington. (Motion for Summary Judgment, Ex. D, Aff. of John Moore). When Ms. Simington found out that she was pregnant, she told Mr. Moore that he was the father. (Resp. to Summary Judgment, Ex. 3, Aff. of Barbara Simington). Mr. Moore said that he did not want another child and told her to get an abortion. (*Id.*). Ms. Simington refused. (*Id.*).

Mr. Moore came to the hospital after the child was born on July 31, 1974. (*Id.*). He visited the child sporadically and attended her first birthday party. (*Id.*). He knew at the time that Ms. Simington was receiving public assistance to support the child. (*Id.*). Since the child's first birthday party, Mr. Moore has "had no relationship, contact or communication directly with the child." (Motion for Summary Judgment, Ex. D, Aff. of John Moore). He has not contributed to the child's support. (*Id.*).

Ms. Simington applied for AFDC payments on July 9, 1974. She did not name Mr. Moore as the father because of his concern that he would be accused of statutory rape. (Resp. to Summary Judgment, Ex. 3, Aff. of Barbara Simington). Ms. Simington, however, later disclosed Mr. Moore's name. (*Id.*). As part of her AFDC application, Ms. Simington assigned her right to child support to the state welfare agency. The agency did not notify Mr. Moore that he had been named as the father. The state initiated proceedings in 1985 to have Mr. Moore declared to be the father of the child

and to recover past and future child support from him pursuant to the assignment.

C. Robert Dickinson.

Robert Dickinson "saw [Bonnie Cowden] socially during New Years Eve of 1980-1981." (Motion for Summary Judgment, Ex. B, Aff. of Robert Dickinson). He "saw" Ms. Cowden once or twice during the following week. (*Id.*). Approximately three weeks later Ms. Cowden told Mr. Dickinson that she suspected she was pregnant and that she was going for a pregnancy test the next day. (Resp. to Summary Judgment, Ex. 2, Aff. of Bonnie Cowden). Mr. Dickinson called her shortly thereafter and learned that she in fact was pregnant. (*Id.*). He told her to have an abortion, but she refused. (*Id.*).

After Ms. Cowden became pregnant, Mr. Dickinson broke off their relationship. (*Id.*). They still saw each other occasionally during her pregnancy, however. (*Id.*). A week after the child was born on October 13, 1981, Ms. Cowden called Mr. Dickinson to tell him about the new baby. (*Id.*). She testified:

> [My phone call] awakened him and he said he had no comment about his daughter. He said he would call me back but he never did. He never offered to pay child support. He never took the opportunity to be involved with Nancy [the child] in any way. In January or February of 1982, I sent him pictures of Nancy. He never responded to those either.

(*Id.*).

Ms. Cowden applied for AFDC payments. As part of the application, she named Mr. Dickinson as the father of her child and assigned her statutory child support rights to the state welfare agency. The agency did not notify Mr. Dickinson that he had been named as the child's father. The state initiated proceedings in 1985 to have Mr. Dickinson declared the child's father and to recover back and future child support

from him pursuant to the assignment.

REASONS FOR DENYING CERTIORARI

The putative fathers argue that the state's failure to notify each of them that they had been named as the father of an illegitimate child when the mother applied for public assistance violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Their primary claim is that the lack of notice prevented them from bonding with the children. The claim is somewhat hollow—if not frivolous—where, as here, each putative father knew that the child had been born, each knew that the mother considered him to be the father, and each repeatedly rejected the mother's attempts to have him support and nurture the child.

Not only are petitioners' federal claims insubstantial, but the Court also lacks jurisdiction to consider them. This brief first will address the two jurisdictional bars to hearing this case. It then will explain why this case does not present an issue that warrants granting certiorari.

I. The Court of Appeals' Decision Rests on an Independent and Adequate State Procedural Ground.

The state trial court granted summary judgment in favor of the putative fathers finding that "the lack of notice has deprived (the putative fathers) of [their] guarantees to due process and equal protection under the 14th Amendment to the United States Constitution and under the Oregon Constitution." (Order Granting Summary Judgment, App. B at 4). Unlike the trial court, the court of appeals did not reach the putative fathers' state or federal constitutional claims. Rather, it reversed solely on state procedural grounds.

The court of appeals began its analysis by noting that, as a matter of state law, "[s]ummary judgment may be granted where there is no genuine issue of material fact. . . ." *State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 690. It held that "the issue of paternity [which each petitioner disputed] is

material in each case" and it reversed to allow the trial court to decide whether petitioners were in fact the biological fathers. *Id.* The court of appeals thus rested its holding solely on a question of state procedural law—whether a disputed issue of material fact made summary judgment improper. Although the putative fathers do not address how the court of appeals' decision could be said to raise a federal issue, their petition suggests two possibilities.

First, the putative fathers argue that the court of appeals held that they lacked standing to pursue their federal claims. (*See* Petition 12-13). The short answer to this argument is that the question whether a person has standing in state court is solely a state-law issue.[2] *See ASARCO Inc. v. Kadish*, ___U.S. ___, 109 S.Ct. 2037, 2045 (1989) (state-court standing requirements are separate from federal standing questions). Moreover, the putative fathers' characterization of the court of appeals' reasoning is inaccurate. The court of appeals' opinion does not hold that petitioners lack standing to raise federal issues.[3] It merely establishes the sequence in which the trial court should resolve their non-constitutional and constitutional claims. It recognizes that if, as the

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[2] If a state standing doctrine precluded a litigant from raising federal constitutional claims altogether, it would be subject to a due process attack or perhaps an argument that the state court procedural rule was inconsistent with the Court's role under the Supremacy Clause. As explained below, however, the Oregon Court of Appeals' opinion does not address questions of standing to raise federal issues nor does it preclude the putative fathers from having their federal claims considered in a meaningful fashion in state court.

[3] Petitioners assert that "the court, using a standing analysis, held that '[putative fathers] may not invoke claims of other persons who might be fathers.' " (Petition 12 quoting *State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 691 (brackets in petition)). The portion of the opinion petitioners quote addresses petitioners' argument that the state was estopped to institute filiation proceedings because it had waited an undue amount of time. *See State ex rel. AFSD v. Kitchens*, *supra*, 93 Or. App. at 691. Although not completely clear, the court of appeals' use of *jus tertii* appears to be focused on a state question of estoppel.

putative fathers assert, they are not the biological fathers, then there is no need to reach the state and federal constitutional issues they raise. Directing the trial court to consider the issues in this sequence is consistent with well-established state practice. *See Lloyd Corp. v. Whiffen*, 307 Or. 674, ___ P.2d ___ (1989) (reiterating that Oregon courts should decide issues in a way that avoids, if at all possible, constitutional questions).

Second, the putative fathers argue that the court of appeals' opinion prevents them from having their constitutional claims considered in a meaningful way.[4] (Petition 19-20). They contend that because their constitutional claims go to the question of whether paternity should be established,[5] delaying consideration of those claims until after paternity is established renders their rights meaningless. (*Id.*). Petitioners' concerns are misplaced. The court of appeals' opinion only requires the trial court to decide first if petitioners are in fact the biological fathers. If they are, then the trial court is free to consider each father's constitutional claims in deciding whether it would be in the child's best interests to establish paternity.

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[4] Although the putative fathers do not identify the federal issue raised by this interpretation of the Oregon Court of Appeals' opinion, the question would be whether the procedural ground on which the state court judgment rests is itself a denial of due process. *See Michel v. Louisiana*, 350 U.S. 91 (1955) (state procedural requirement that objections to grand jury be raised within three days is consistent with due process).

[5] Although the putative fathers' argument is not completely clear, it appears to run as follows: The state, they contend, unconstitutionally deprived them of the opportunity to bond with their children by failing to notify them that the mothers named them as the fathers when they applied for public assistance. Because the children have gone so long without bonding, declaring the putative fathers to be the children's fathers at this point would disrupt the children's lives unduly. Accordingly, the putative fathers conclude, they have a constitutional right not to be named as the children's fathers.

Petitioners may disagree with the order in which the state court of appeals directed that their claims be decided. But requiring that the state trial court decide the underlying merits of the case before reaching petitioners' affirmative defenses does not present any federal constitutional issue. It presents only a question of state procedural law. This Court accordingly lacks jurisdiction.

II. Even If the State Court's Judgment Rests on Federal Grounds, the Judgment Is Not Final.

The Oregon Court of Appeals reversed the trial court's grant of summary judgment and remanded for trial. As a general rule, a state court judgment that contemplates further proceedings, as this judgment does, is not final for the purposes of 28 U.S.C. section 1257(3) (1982). *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 479-85 (1975). Nor does this case fall within any of the four exceptions to the rule which the Court identified in *Cox Broadcasting*.

First, this is not a case in which the outcome of further state proceedings is preordained. *See id.* at 479; *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953). Petitioners have asserted that they are not the biological fathers, and the state court of appeals found that this was a disputed issue of material fact that required a trial on the merits.

Second, this is not a case in which the federal issue will remain regardless of the outcome of the trial on remand. *Cox Broadcasting v. Cohn, supra*, 420 U.S. at 480; *Radio Station WOW v. Johnson*, 326 U.S. 120, 124-27 (1945) (subsequent accounting could not affect federal issue). If the state fails to prove that petitioners are the biological fathers, then there will be no need to reach the federal constitutional issues petitioners raise. Moreover, as this Court has recognized, the Oregon courts typically decide state constitutional issues before reaching federal constitutional questions. *See Employment Div., Department of Human Res. v. Smith*, 485 U.S. 660,

108 S.Ct. 1444, 1447 & n 9 (1988). If, on remand, petitioners prevail under the state constitution, then the state courts will not reach the federal constitutional issues. *See Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369 n 12, 723 P.2d 298 (1986), *appeal dismissed*, 480 U.S. 942 (1987); *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983).

Third, this is not a case in which the federal issue will necessarily be mooted on remand. *Cox Broadcasting v. Cohn*, *supra* 420 U.S. at 481; *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973). If the state proves that the putative fathers are the biological fathers and if the putative fathers have no valid state constitutional claim, then the trial court will have to reach the federal constitutional claims.

Finally, this is not a case in which the failure to grant review immediately would seriously erode federal policy. *See Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 482-83; *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963). Petitioners' claims do not implicate questions of national labor policy, as the pre-emption issue in *Curry* did. Rather, the due process issues of timely notice raised here are much closer to the due process claims raised in *Miner v. Gillette Co.*, 459 U.S. 86 (1982), which the Court dismissed for lack of jurisdiction because there was no final judgment.[6] Moreover, because, as explained below, the particular federal questions petitioners raise are not substantial, declining to grant certiorari now will not seriously erode federal policy.

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[6] In *Miner*, the defendant petitioned for certiorari from an Illinois Supreme Court decision which held that a state court did not have to have personal jurisdiction over all plaintiffs to certify a non-resident plaintiff class. *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478 (1981). The decision was not final because the state supreme court had remanded to allow the trial court to decide whether such a class would be manageable. *See* 428 N.E.2d at 484.

The Court later decided the question when it was properly presented in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

III. The Putative Fathers' Due Process Claims Are Insubstantial.

The putative fathers' constitutional analysis identifies why, in their view, the state's action impinges on a protected liberty interest and a protected property interest. (*See* Petition 33-41). The state will respond to their arguments in turn.

A. Protected Liberty Interests.

The putative fathers rely on *Lehr v. Robertson*, 463 U.S. 248 (1983), to argue that they have a constitutionally protected "opportunity interest" to bond with the children. (Petition 33-35). *Lehr* does not support petitioners' claims. In *Lehr*, the state terminated the father's interest by allowing the child to be adopted. In this case, the state is not terminating petitioners' interests. It is seeking to prove that petitioners are in fact the children's biological fathers. The state thus would appear to be advancing petitioners' "opportunity interests," not frustrating them.[7]

The putative fathers argue, however, that the problem is that the state has not done enough. They claim that because the state failed to notify them that the mothers had identified them as the fathers, petitioners lost their only meaningful opportunity to form bonds with the children. (*See* Petition 16-17). They argue:

> Through these delays, and the withholding of Title IV-A notice, states may suppress information from putative fathers in such manner that they are not

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[7] *Lehr* does not support petitioners for a second reason. The Court recognized in *Lehr* that unwed fathers who have developed a relationship with the child have a strong liberty interest, while persons who are merely biological fathers have only a minimal liberty interest in the opportunity to form a relationship with their child. 463 U.S. at 260-64. *Lehr* does not suggest, however, that persons who are *not* the biological father enjoy any constitutionally protected interest. It is, thus, difficult to see how petitioners can deny that they are the biological fathers and at the same time claim a constitutionally protected liberty interest.

> encouraged to seek timely legal advice. This means that they may, as has happened to these putative fathers, lose the opportunity to assume their responsibilities as parents in a timely fashion.

(Petition 16). The short answer to this argument is that the Due Process Clause does not require the state to take steps to increase a father's opportunity to bond with his children. *See DeShaney v. Winnebago Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1003 (1989). It only protects the termination or deprivation of that opportunity. *See id*; *Lehr v. Robertson*, *supra*.

In any event, even if the Due Process Clause imposes such an obligation on the state, the absence of any official notice was harmless on the facts of this case. Each of these putative fathers knew that the mother had given birth to a child, each knew that the mother claimed that the child was his, and each failed to support or nurture the child. Indeed, Mr. Kitchens did not come to see his son even though Mr. Kitchens' family told him that the boy was so sick he nearly died. If these putative fathers have lost the opportunity to "assume their responsibilities as parents in a timely fashion," as they assert in their petition, they can hardly lay the blame at the state's door.[8]

Finally, even if the state improperly failed to notify these putative fathers in time to allow them to bond with their children, that does not preclude the state from now seeking to establish the children's paternity. As the Court recognized in *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 3005 (1987), "the primary interest of the defendant [in a filiation proceeding] is in avoiding the serious economic consequences that

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[8] The putative fathers' argument to the contrary rests on the factual assumption that they did not know about the children. (*See, e.g.*, Petition 48). Because, however, this case arises on the putative fathers' motions for summary judgment, the facts must be taken in the light most favorable to the state. The facts have been set out in that light above.

flow from a court order that establishes paternity and its correlative obligation to provide support for the child." The fact that the putative father has not previously had an opportunity to bond with his child does not preclude the state from asking the father to assume his share of the financial responsibility.[9]

B. Protected Property Interests.

Petitioners argue:

> Putative fathers have a constitutional due process property right to Title IV-A notice [notice when the mother applies for AFDC payments], because of their entitlement to rectify the needs of the children by coming forward and raising the children, or to mitigate "the serious economic consequences" by beginning to pay some support for the children.

(Petition 41). The short answer to this argument is that any time these putative fathers wanted to rectify the needs of their children or mitigate the serious economic consequences by beginning to pay child support, they could have done so. Each putative father knew that the mother considered him to be the father. Nothing prevented these putative fathers from "coming forward" and paying child support. On these facts, the absence of official notice that each of these petitioners had been identified as the father when the mother applied for AFDC payments is immaterial to the loss petitioners allegedly sustained.

The petition also suggests that the failure to notify petitioners implicated a protected property interest because child

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[9] If, as the putative fathers suggest, they are concerned about disrupting the children's existing relationships, *see* note 5 *supra*, their concern is misplaced. The existence of an order establishing paternity simply imposes a financial obligation on a parent. It does not require that parent to form a relationship with the child or to take actions that would disrupt the child's world in any way. A father who is concerned that his presence would be detrimental to the child's best interests, as these putative fathers claim to be, can simply send in his money and not disturb his child's life.

support was accruing without the petitioners' knowledge. The difficulty with this suggestion is that Oregon law imposes a duty of support on all parents. Or. Rev. Stat. § 109.010 (1987); *Haxton and Haxton*, 299 Or. 616, 705 P.2d 721 (1985). Under state law, the duty to pay child support and the resulting financial obligation began accruing the moment the child was born. *Id.* The mother's application for public assistance and her assignment of the right to recover child support to the state did not change the nature of the underlying obligation. *State ex rel. AFSD v. Lester*, 45 Or. App. 389, 392, 608 P.2d 588 (1980); *Butchko v. Butchko*, 43 Or. App. 199, 203, 602 P.2d 672 (1979).[10] It merely changed the payee. The identity of the payee is not a protected property interest for which the Due Process Clause requires notice.[11]

IV. Equal Protection.

The putative fathers argue that the state notifies married fathers but not unmarried fathers when a mother applies for AFDC payments. (Petition 43). They assert that this distinc-

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[10] When, as in this case, the state has provided AFDC payments, the state could either assert the mother's right to child support pursuant to the assignment or seek to recover a "state debt" for the amount paid, Or. Rev. Stat. § 416.410(1) (1987). The former claim allows the state to recover only what the father owes for child support, which may well be less than the AFDC payments made. The latter claim allows the state to recover all the payments it made for the benefit of the child. In this case, the state is only seeking to enforce the mothers' child support rights that had been assigned to the state. It is not seeking to recover a state debt pursuant to Or. Rev. Stat. § 416.410(1) (1987).

[11] As a matter of state law, an assignee may protect his or her interests by notifying the debtor of the assignment. *See State Farm Ins. v. Pohl*, 255 Or. 46, 50, 464 P.2d 321 (1970). Absent notice, any payment the debtor makes to the assignor is credited against the amount now owed the assignee. *Meier v. Hess* 23 Or. 599, 603, 32 P. 755 (1893); *State ex rel. Hansen v. McKay*, 31 Or. App. 631, 636, 571 P.2d 166 (1977). While the assignee thus may have an incentive to notify the debtor of the assignment, the failure to do so does not invade any constitutionally protected property interest the debtor enjoys.

tion violates the Equal Protection Clause. This argument lacks merit for three reasons. First, the state does not distinguish between married and unmarried fathers. Second, the "notice" given certain fathers is solely to determine eligibility for AFDC payments. Finally, the distinction the state draws is rationally based on federal statutes, federal regulations, and this Court's decisions.

Before turning to the putative fathers' arguments, it is helpful to explain the background against which the state acts. The AFDC program provides assistance to needy children. In determining the needs of a child who applies for AFDC payments, the statutes direct cooperating states to consider "any other income and resources [of the child]." 42 U.S.C. § 602(a)(7) (1982). The parent's income is one source of funds that must be taken into consideration. 45 C.F.R. § 233.90 (1988). The question, however, of who is a parent for the purposes of determining AFDC eligibility has proved complex.

The Court has recognized that the term "parent," as used in the AFDC statutes and regulations, includes "only those persons with a legal duty of support." *King v. Smith*, 392 U.S. 309, 327 (1968). In *Lewis v. Martin*, 397 U.S. 552, 559 (1970), however, the Court explained that the "legal duty of support" identified in *King* was a necessary but not sufficient condition for qualification as a "parent." The Court upheld the Department of Health, Education and Welfare's determination that even though some persons might have a legal obligation to support a child, the fulfillment of that obligation was "sufficiently uncertain in the absence of the marriage tie" to require that that person's income automatically be considered in determining the child's eligibility for AFDC payments. *Id.* In effect, the Court held that in deciding an applicant's eligibility

for AFDC, a state was only required to consider the income from married parents and those unmarried parents whose legal support obligations were sufficiently certain.

The evidence brought out in opposition to the summary judgment motion is consistent with this Court's cases and Department of Health and Human Services' regulations. The evidence demonstrated that when an applicant applies for AFDC payments, the state agency requests all married parents and some unmarried parents to report how much money they contribute monthly to the household's income. (Resp. to Summary Judgment, Ex. 4, Aff. of Kathie Blair). The agency's practice recognizes that although all married fathers have a clearly established legal obligation to support their children, the obligation of only some unmarried fathers (such as those whose paternity has been acknowledged or established) may be sufficiently certain to require consideration of their income in determining the child's eligibility for AFDC payments.

In light of this background, the putative fathers' equal protection claims are meritless. The state does not distinguish on the basis of marital status. It distinguishes on the basis of the certainty of the father's fulfilling his legal obligation of support. As the Court recognized in *Lewis*, this class will include all married parents and a small percentage of unmarried ones. Because the state does not classify on the basis of even an arguably suspect classification, *compare Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) (law that significantly interferes with right to marry subject to "rigorous scrutiny"), the only question is whether the distinction is a rational one. *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam). It is difficult to see how a distinction that complies with federal regulations that have been upheld by the Court lacks a rational basis.

Finally, even if there were some question of an equal protection violation, the putative fathers in this case have not been injured by any lack of notice. The notice the agency sends out would have told them only that the mother had applied for AFDC payments on behalf of a named child and that the "case record indicates that you may have an interest in the listed person(s)." (Resp. to Summary Judgment, Ex. 4, Attachment to Aff. of Kathie Blair). This "notice" would not have told these putative fathers any relevant information they did not already know.

V. The Procedure Established by the Court of Appeals' Decision Does Not Deprive the Putative Fathers of Due Process.

The final argument the putative fathers make is that under the court of appeals' decision

> loss of [their] constitutional rights may not be asserted by putative fathers as available, meritorious defenses when the courts determine the factual issue of paternity in simplified, state-initiated Title IV-D filiation proceedings.

(Petition 55). As explained above, the putative fathers misread the court of appeals' opinion. The opinion merely requires that the trial court first decide whether petitioners are the children's biological fathers before considering petitioners' affirmative defenses. The court of appeals' opinion does not preclude the trial court from subsequently considering petitioners' constitutional claims in deciding whether to enter an order establishing the paternity of the children.

CONCLUSION

For the reasons set out above, the petition for certiorari should be denied.

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